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No. 02-1672

In the Supreme Court of the United States

RODERICK JACKSON, PETITIONER

v.

BIRMINGHAM BOARD OF EDUCATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the private right of action for violations of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, encompasses redress for retaliation for complaints about unlawful sex discrimination.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. The position of the United States is that the petition for a writ of certiorari should be granted.

STATEMENT

Petitioner Roderick Jackson, a teacher, filed suit against respondent Birmingham Board of Education alleging that respondent retaliated against him because he had complained about sex discrimination in the school's athletic program. Petitioner alleged that such retaliation violates Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* The district court dismissed petitioner's complaint for failure to state a claim, holding that Title IX does not prohibit retaliation. The court of appeals agreed that Title IX does not

prohibit retaliation and affirmed the district court's judgment of dismissal.

1. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a). Title IX is modeled on Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, which prohibits discrimination on the basis of race in federally assisted programs. See *Cannon* v. *University of Chicago*, 441 U.S. 677, 694 (1979).

Section 902 of Title IX authorizes federal agencies that provide federal financial assistance "to effectuate" Title IX "by issuing rules, regulations, or orders of general applicability," and to enforce such regulations administratively. 20 U.S.C. 1682. Pursuant to that directive, the Department of Education adopted a regulation addressing retaliation that was originally issued to enforce Title VI. See 34 C.F.R. 106.71 (incorporating 34 C.F.R. 100.7(e)). The regulation is entitled "*[i]ntimidatory or retaliatory acts prohibited*" and provides that:

> No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.

34 C.F.R. 100.7(e).

2. In 1993, respondent hired petitioner as a physical education teacher and coach for the girls' basketball team. Pet. App. 3a. During his coaching tenure, petitioner came to believe that respondent was not

providing the girls' basketball team with equal funding or equal access to sports facilities and equipment. *Ibid.* After petitioner complained to his supervisors about the treatment of the girls' basketball team, he began to receive negative evaluations. *Ibid.* In May 2001, respondent relieved petitioner of his coaching duties. *Ibid.* Respondent still employs petitioner as a teacher, but petitioner no longer receives the supplemental pay he received for coaching. *Id.* at 3a, 29a & n.1.

Petitioner filed suit against respondent in federal district court, alleging that respondent retaliated against him, in violation of Title IX. Pet. App. 29a. The district court dismissed petitioner's complaint, holding that Title IX does not create a private cause of action for retaliation. *Id.* at 27a.

The court of appeals affirmed. Pet. App. 1a-26a. The court first held that, while the text of Section 901 (20 U.S.C. 1681) protects individuals in federally assisted programs from discrimination on the basis of sex, it does not create a private right of action for retaliation. Pet. App. 19a-20a. The court reasoned that "[n]othing in the text indicates any congressional concern with retaliation that might be visited on those who complain of Title IX violations," and "[i]ndeed, the statute makes no mention of retaliation at all." *Id.* at 20a.

The court next held that Section 902 (20 U.S.C. 1682) does not create a private cause of action for retaliation either. Pet. App. 20a-21a. The court reasoned that Section 902 is "devoid of 'rights-creating' language of any kind—whether against gender discrimination, retaliation, or any other kind of harm," and instead "directs and authorizes *federal agencies* to regulate recipients of federal funding." *Id.* at 21a. The court also concluded that Section 902's provision for administrative enforcement "strongly counsels against inferring a private

right of action against retaliation, because '[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" *Ibid.* (quoting *Alexander* v. *Sandoval*, 532 U.S. 275, 290 (2001)).

The court of appeals acknowledged that a Department of Education regulation expressly protects individuals from retaliation, but it held that the regulation does not create a private cause of action for retaliation. Pet. App. 22a. Relying on this Court's decision in *Sandoval*, 532 U.S. at 291, the court reasoned that an agency may not afford a private right of action through regulation when Congress has not done so in the statute itself. Pet. App. 22a.

Finally, the court held that even if Title IX prohibits retaliation, petitioner would not be within the class of persons protected by that prohibition. Pet. App. 23a-24a. In the court's view, the statute only protects "direct victims of gender discrimination," and not persons "who care for, instruct, or are affiliated with" the direct victims. *Ibid.*

DISCUSSION

The court of appeals' holding that Title IX does not forbid retaliation is incorrect; it conflicts with the Fourth Circuit's decisions in *Peters* v. *Jenney*, 327 F.3d 307 (2003), and *Litman* v. *George Mason Univ.*, No. 01-2128, 2004 WL 345758 (Feb. 25, 2004); and it raises an issue of recurring importance. The petition for a writ of certiorari should therefore be granted.

A. The Court Of Appeals Erred In Holding That Title IX Does Not Prohibit Retaliation

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected

to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a). Title IX does not expressly authorize a private suit to enforce its prohibition. In *Cannon* v. *University of Chicago*, 441 U.S. 677, 691-693 (1979), however, the Court held that Title IX's rights-creating language reflects a congressional intent to authorize private enforcement. In *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court held that Title IX authorizes private parties to seek damages for intentional violations of Title IX. Subsequent decisions have reaffirmed that Title IX authorizes private suits for damages for intentional violations of the statute. *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 642 (1999); *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

The court of appeals in this case held that a retaliation victim may not maintain a private cause of action for damages under Title IX because such retaliation can never violate the terms of the statute. The court reasoned that "[n]othing in the text indicates any congressional concern with retaliation that might be visited on those who complain of Title IX violations," and "[i]ndeed, the statute makes no mention of retaliation at all." Pet. App. 20a. That analysis is flawed.

1. First, Title IX's text prohibits "discrimination" against any person "on the basis of sex," regardless of the form that the discrimination takes. When a recipient purposefully retaliates against an individual *because* that individual has complained *about intentional sex discrimination*, as opposed to some other matter, the recipient can readily be viewed as having subjected that person to "discrimination" "on the basis of sex." Because that form of retaliation falls within Title IX's general terms, Title IX's failure to refer specifically to

retaliation is not controlling. Just as Title IX's broad prohibition against intentional discrimination covers other forms of intentional discrimination to which the statute does not specifically refer (*e.g.*, sexual harassment), it covers intentionally discriminatory retaliation.

That does not mean that a general nondiscrimination provision invariably encompasses a prohibition against discriminatory retaliation. Other relevant indicators of statutory intent could show that retaliation is categorically excluded from a broad nondiscrimination provision. As explained in Sections 2 and 3, however, the background and purposes of Title IX demonstrate that its prohibition against discrimination on the basis of sex encompasses discriminatory retaliation.

Under Title IX's statutory standard, not every act of retaliation against a person who has complained about sex discrimination violates Title IX. Because Title IX only prohibits actions taken "on the basis of sex," a recipient that indiscriminately retaliates against all complainers as a class would not violate the statute. But when the recipient purposefully retaliates against a complainant because the complaint is about intentional sex discrimination, Title IX's "on the basis of sex" requirement is satisfied.

2. The court of appeals' constricted reading of Title IX not only fails to give full effect to the statutory text, it also fails to take into account the legal background against which Title IX was enacted. Just three years before Title IX was enacted, this Court decided *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969). Sullivan, a white man, owned two houses, each of which came with a "membership share" that entitled him to use a privately-owned park. Sullivan rented one of the houses to a black man and assigned one of the membership shares to him. The corporation that owned the

park refused to approve the assignment because the lessee was black. When Sullivan protested that action, the corporation expelled him and took away both of his membership shares. Sullivan then sued the corporation, alleging a violation of 42 U.S.C. 1982, which provides that "[a]ll citizens of the United States shall have the same right * * * as is enjoyed by white citizens * * * to inherit, purchase, lease, sell, hold, and convey real and personal property," and which had previously been construed by this Court to prohibit all "racial discrimination * * * in the sale and rental of property." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968).

Of critical importance here, the *Sullivan* Court held that Sullivan could maintain an action under Section 1982 not just for being denied the right to complete his transaction with a black person, but for "expulsion for the advocacy of [that person's] cause." 396 U.S. at 237. The Court reasoned that "[i]f that sanction, backed by a state court judgment, can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property." *Ibid.*

Thus, just three years before Title IX was enacted, this Court had construed a prohibition on racial discrimination in the sale or rental of property to cover retaliation against persons who complain about such discrimination. Against that background, Congress would have understood that, by prohibiting sex discrimination in federally funded educational programs, it was simultaneously forbidding recipients from retaliating against persons who complain about that form of discrimination. Congress would have seen no need to enact a prohibition that specifically referred to retalia-

tion. See *Cannon*, 441 U.S. at 696-698 (Congress is presumed to be aware of the law).

3. The court of appeals also failed to interpret the scope of Title IX's private right of action "in light of the purposes Congress sought to serve." *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 118 (1983) (quoting *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979)). In enacting Title IX, Congress "sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices." *Cannon*, 441 U.S. at 704. Those objectives would be difficult, if not impossible, to achieve if recipients remained free to retaliate against individuals who complain about sex discrimination.

Indeed, before Title IX was enacted, Congress heard substantial evidence that persons had been censured or fired for complaining about sex discrimination at educational institutions.[1] There is no plausible reason that

[1] See *Discrimination Against Women: Hearings Before the Special Subcomm. on Educ. of the House Comm. on Educ. & Labor*, 91st Cong., 2d Sess. Pt. 1, at 242 (1970) (testimony of Dr. Ann Harris) ("At other educational institutions, women who have criticized their faculties for sexual discrimination have been 'censured for conduct unbecoming,' a rare procedure in academe normally reserved for actions such as outright plagiarism."); *id.* at 247 ("Other women have spoken to me privately [about the sex discrimination they experienced], but were reluctant to testify publicly for fear of reprisals."); *id.* at 302 (statement of Bernice Sandler) ("It is also very dangerous for women students or women faculty to openly complain of sex discrimination on their campus. * * * At a recent meeting of professional women I counted at least four women whose contracts were not renewed after it became known that they were active in fighting sex discrimination at their respective institutions."); *id.* at 463 (testimony of Daisy Fields) ("few women have dared to file complaints of sex discrimination" because "[w]e know of a number of such cases" in which "women who have filed complaints have suffered reprisals in the form of having their jobs abolished" or "have been reassigned to some degrading position far below their capabilities in anticipation they might resign"); *id.* at 588 (statement of Women's Rights Commission of New York University Law School) ("It was recently discovered that one woman had tried to get [the dormitory] opened up ten years ago, when the whole building * * * was closed to women. She raised a complaint at a faculty meeting about this situation; blackballing letters written by faculty members were subsequently placed in her employment file at the law school without her knowledge."); *id.* at 1051 (reprinting magazine article) ("A few [women] fight back—and pay the penalty for bucking the male dominated system."); see also 118 Cong. Rec. 5812 (1972) (reprinting article stating that "on some campuses it is still dangerous to fight sex discrimination. I know of numerous women whose jobs were terminated, whose contracts were not renewed, and some who were openly and directly fired for fighting such discrimination.").

Congress would have responded to that evidence by providing substantially reduced remedial options for victims of conduct that was so detrimental to the achievement of Congress's goals. A recipient of federal assistance can have no legitimate interest in retaliating against persons who complain about unlawful discrimination, and the court of appeals did not even attempt to identify one.

4. The court of appeals' interpretation of Title IX also conflicts with the interpretation adopted by the Department of Education, the agency with primary responsibility for enforcing Title IX. The Department of Education has adopted a regulation that expressly prohibits "intimidatory" and "retaliatory acts." 34 C.F.R. 106.71 (incorporating 34 C.F.R. 100.7(e)) (emphasis deleted). That regulation specifies that:

> [n]o recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.

Ibid. That regulation reflects the Department of Education's position that "retaliation is prohibited by Title IX." 62 Fed. Reg. 12,044 (1997). Because the Department of Education has primary responsibility for enforcing Title IX, its interpretation is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984).[2]

Relying on *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), the court of appeals discounted the Department of Education's retaliation regulation on the ground that an agency regulation cannot create a private right of action when the statute has not done so. Pet. App. 22a-23a. The court's reliance on *Sandoval* in this context is misplaced. In *Sandoval*, the Court held that Title VI

[2] The Department of Justice is responsible for coordinating the enforcement of Title IX by federal agencies. See Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980), and it has adopted the same retaliation regulation as the Department of Education, see 65 Fed. Reg. 52,858-52,895 (2000) (adopting Title IX rules for 21 federal agencies including the Department of Justice). The Department of Justice has also stated in a manual directed to federal agencies that retaliation is one of the "general types of prohibited discrimination." U.S. Dep't of Justice, *Title IX Legal Manual* 57 (Jan. 11, 2001) <www.usdoj.gov/crt/cor/coord/ixlegal.pdf>. Because the Department of Justice has responsibility for coordinating the enforcement of Title IX by federal agencies, its view is likewise entitled to deference. *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 634 (1984).

regulations that prohibit discriminatory effects cannot be privately enforced because Title VI itself only prohibits intentional discrimination and agency regulations that go beyond Title VI's prohibitions may not be privately enforced. 532 U.S. at 285-286. The *Sandoval* Court made clear, however, that prohibitions reflected in regulations that validly "construe the statute itself" may be privately enforced because a "Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." *Id.* at 283-285. Since the Department of Education's retaliation regulation reflects a valid interpretation of the terms of Title IX itself, that interpretation of the statute may be enforced through the private cause of action conferred by Title IX.

There is no need in this case, however, to rely on that aspect of *Sandoval* or on principles of *Chevron* deference to resolve the question presented. The text, background, and purposes of Title IX all point to the conclusion that Title IX's prohibition against discrimination on the basis of sex incorporates protection against retaliation. The Department of Education's considered view simply reinforces that conclusion.

5. The court of appeals alternatively held that, even assuming that Title IX prohibits retaliation, teachers and coaches who complain about sex discrimination against students are not within the class of persons protected by Title IX. Pet. App. 23a-24a. That holding cannot be reconciled with the text, background, and purposes of Title IX.

The text of Title IX does not require that the victim of discriminatory retaliation must also be the victim of the discrimination that is the subject matter of the original complaint. It simply requires a showing that

the recipient has engaged in retaliation against the complainant "on the basis of sex," and that requirement can be satisfied regardless of whether the complainant is also a victim of the discrimination that was the subject matter of the original complaint. In particular, as discussed above, where the recipient engages in purposeful retaliation because an individual has complained about intentional sex discrimination, Title IX's "on the basis of sex" requirement is satisfied.

Consistent with Title IX's text, the Department of Education's retaliation regulation rejects any distinction between classes of retaliation victims. A recipient violates the regulation when it retaliates against any complainant "for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint [of unlawful sex discrimination]." 34 C.F.R. 106.71 (incorporating 34 C.F.R. 100.7(e)).

The court of appeals' limitation also conflicts with *Sullivan*. The white victim in *Sullivan* complained about race discrimination directed at his black lessee, and the Court squarely held that he could maintain a private cause of action for discriminatory retaliation.

Finally, Congress's goal of eliminating federal support for sex discrimination and providing protection to individuals against sex discrimination would be ill-served by the court of appeals' limitation. Teachers and coaches are often in a much better position to identify sex discrimination and express opposition to it than are the students who are denied equal educational opportunities.

Thus, the court of appeals not only erred in ruling that Title IX never prohibits retaliation; it also erred in ruling that protection against retaliation could not extend to teachers and coaches who complain about discrimination directed to their students. This Court's review is warranted to correct those erroneous rulings.

B. There Is A Conflict In The Circuits On The Question Presented

Review is also warranted because the court of appeals' decision in this case conflicts with the Fourth Circuit's post-*Sandoval* decision in *Peters* v. *Jenney*, 327 F.3d 307 (2003). In *Peters*, a school district failed to renew the contract of the director of one of its educational programs after she had complained about discrimination against black students. The former director filed suit, alleging that the school district had retaliated against her in violation of Title VI. Relying on the Department of Education's Title VI retaliation regulation, and this Court's decision in *Sullivan*, the Fourth Circuit held that Title VI forbids "purposeful retaliation based upon opposition to practices made unlawful [by Title VI.]" *Id.* at 318. In reliance on *Sullivan*, the Fourth Circuit also held that Peters could maintain a private right of action for retaliation even though she was not one of the students allegedly subjected to the original discrimination. The *Peters* court expressly declined to follow the Eleventh Circuit's decision in this case, on the ground that the Eleventh Circuit "did not consider the impact of *Sullivan* * * * on the question that we decide today." 327 F.3d at 318 n.10.

The court of appeals' decision in this case involves a construction of Title IX, while the Fourth Circuit's decision in *Peters* involves a construction of Title VI. But since Title IX was modeled on Title VI, and the relevant text of Title IX tracks the relevant text of Title VI, *Cannon*, 441 U.S. at 694-696, the two decisions cannot be distinguished on the ground that they address different statutory provisions.

Indeed, in *Litman* v. *George Mason University*, No. 01-2128, 2004 WL 345758 (Feb. 25, 2004), the Fourth Circuit recently issued a summary decision holding that Title IX authorizes a private right of action to seek damages for retaliation. The Fourth Circuit explained that "[b]ecause Title VI and Title IX are to be interpreted in the same manner, * * * the decision in *Peters* compels the conclusion that Title IX likewise includes a private right of action for retaliation." *Id.* at *1 (internal quotation omitted). There is therefore a square conflict between the Eleventh Circuit and the Fourth Circuit on the question presented in this case. Review is warranted to resolve that conflict.[3]

C. The Question Presented Is One Of Recurring Importance

Finally, the question whether Title IX authorizes a private right of action for retaliation is one of recurring importance. That issue and the related issue whether Title VI authorizes a private right of action for retaliation have arisen with increasing frequency in the

[3] In *Lowrey* v. *Texas A & M University System*, 117 F.3d 242, 249-254 (1997), the Fifth Circuit held that there is a private right of action to enforce the Department of Education's retaliation regulation. But that holding appears to have been premised on the view that the regulation could authorize a private right of action for retaliation even if the statute does not, and that line of analysis does not survive *Sandoval*. The Fifth Circuit has not revisited the issue since *Sandoval*. Several other circuits have rejected Title IX retaliation claims on the merits, both before and after *Sandoval*, without specifically addressing the logically prior question whether Title IX prohibits retaliation in the first place. See *Frazier* v. *Fairhaven Sch. Comm.*, 276 F.3d 52, 67 (1st Cir. 2002); *Brine* v. *University of Iowa*, 90 F.3d 271, 273-274 (8th Cir. 1996), cert. denied, 519 U.S. 1149 (1997); *Murray* v. *New York Univ. Coll. of Dentistry*, 57 F.3d 243, 251 (2d Cir. 1995).

lower courts. See *Burch* v. *Board of Regents of University of California*, No. Civ. 8-04-0038 (E.D. Cal. Mar. 16, 2004); *Atkinson* v. *Lafayette Coll.*, No. 01-CV-2141, 2003 WL 21956416 (E.D. Pa. July 24, 2003), appeal pending, No. 03-3426 (3d Cir.); *Chandamuri* v. *Georgetown Univ.*, 274 F. Supp. 2d 71 (D.D.C. 2003); *Mock* v. *South Dakota Bd. of Regents*, 267 F. Supp. 2d 1017 (D.S.D. 2003); *Johnson* v. *Galen Health Insts., Inc.*, 267 F. Supp. 2d 679 (W.D. Ky. 2003).

Moreover, the court of appeals' decision, if left undisturbed, would have serious adverse consequences for the enforcement of those statutes. Effective protection against retaliation is indispensable to the achievement of Congress's nondiscrimination goals. And while agency regulations bar retaliation, private enforcement is necessary to achieve a sufficient level of deterrence against retaliation and to make whole the victims of that unlawful conduct. In any event, because Title IX is designed to provide uniform protection against discrimination throughout the nation in all programs that receive federal funds, there should not be a private cause of action available in some circuits, but not others.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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